No. 138

In the Supreme Court of the United States

OCTOBER TERM, 1947

ROBERT C. JOHNSON, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The findings of fact and conclusions of law (R. 41–46) of the District Court of the Southern District of California, Central Division, are not reported. The oral opinion of the District Court appears in the record at pp. 289–302. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 315–329) is reported at 160 F. 2d 789.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 24, 1947 (R. 330). The petition for writ of certiorari was filed on June

18, 1947.[1] The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below erred in holding that, in the particular circumstances of this case, the doctrine of *res ipsa loquitur* could not serve as a basis for sustaining petitioner's claim for damages under the Jones Act.

2. Whether both courts below erred in holding that, as a factual matter, petitioner was not entitled to recover the maintenance and cure here involved.

STATUTES INVOLVED

The Jones Act, Act of March 4, 1915, Sec. 20, 38 Stat. 1185, as amended by Sec. 33 of the Act of June 5, 1920, 41 Stat. 1007, 46 U. S. C. 688, provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * *.

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[1] Service on the Government of the record was not made until August 11, 1947. Thereafter, certain photograph exhibits referred to in the petition were, at the Government's request, forwarded from the United States District Court for the Southern District of California, Central Division, to this Court and were received on August 22, 1947.

The Federal Employers' Liability Act, Act of April 22, 1908, Sec. 1, 35 Stat. 65, as amended by the Act of August 11, 1939, 53 Stat. 1404, 45 U. S. C. 51, provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. * * *

STATEMENT

This suit was instituted by a libel filed by petitioner on November 13, 1945, in the United States District Court for the Southern District of California, Central Division (R. 1–8). Petitioner alleged that, while employed as a seaman on the S. S. *Mission Soledad*, he was struck on the head and injured by a block which was "* * * negligently and carelessly dropped by a fellow seaman * * *" (R. 5). He sought damages under the Jones Act, *supra*, as well as compensation for loss of wages, maintenance and cure (R. 9). Respondents answered (R. 9–15), alleging, *inter alia*, that they were ignorant of the cause of the injury and demanded proof thereof (R. 12). A

pretrial stipulation was entered into (R. 35–40), and the case was tried before Judge Hollzer (R. 58). Judge Hollzer, however, died after submission of the case on oral argument and briefs but before decision (R. 49), and by stipulation of the parties, the case was submitted on a transcript of the record to Judge Cavanaugh (R. 49). The facts may be briefly summarized as follows:

On March 25, 1944, petitioner, aged 26, signed on as an able-bodied seaman on the S. S. *Mission Soledad*, a steam tanker owned and operated by the United States (R. 35–36). On June 30, 1944, while the S. S. *Mission Soledad* was at Pearl Harbor, T. H., being prepared for a voyage, and after the portside forward boom had been cradled, petitioner, together with a fellow seaman named Dudder, was engaged in rounding in the block by means of which the boom had been operated (R. 61–62).

When a boom is in use over the side of the ship, it is steadied and manipulated by guy lines and block and tackle (R. 62). One block is attached to the boom, the other block is fastened to the deck (R. 62). When the boom is cradled, the deck block is unfastened, and the lines between the blocks are then hauled in until the blocks are actually touching (the nautical term is "chock a block"). Here, petitioner was standing on the main deck, beneath the meccano[2] deck,

[2] A framework of steel posts and beams built above the main deck in order to carry deck cargo.

aft of the third thwartship beam (R. 105). He was hauling the line from the boom block and coiling it (R. 61, 107). Dudder was on the meccano deck, holding the unfastened deck block and moving toward the boom block as petitioner rounded in the line (R. 102, 107). As Dudder carried the deck block, he kept the lines between the blocks taut to prevent fouling (R. 101, 108). Petitioner, hauling and coiling the line, controlled the rate at which Dudder carried the detached block (R. 107). When petitioner last noticed Dudder, the latter was about six feet aft of the third thwartship beam (R. 103). Petitioner's last recollection of the rounding in operation was bending over and coiling line (R. 110). The block carried by Dudder fell and, swinging on the lines between it and the boom block with the third thwartship beam acting as a fulcrum, struck petitioner on the back of the head.

Petitioner was taken by ambulance to the emergency hospital at the Naval Base and, after receiving first aid, was sent back to the ship where he remained overnight (R. 36, 111). On the following day, he was examined by a U. S. Public Health Service surgeon and was hospitalized for the next four days at the Queen's Hospital, Honolulu (R. 36, 112, 241–242). He was discharged from the hospital on July 5, 1944 (R. 112, 242). The Public Health Service record showed that, although there had been marked improvement in his condition and he was fit for

travel, he was not fit for duty (R. 242). He was returned to San Francisco on another ship, arriving on July 30, 1944, and proceeding to his parents' home at San Diego (R. 114, 116).[3] On August 17, 1944, he was examined by U. S. Public Health Service doctors at Los Angeles and was hospitalized at the Marine Hospital until August 23, 1944, at which time he was sent to the Pacific Palisades Seamen's Rest Center (R. 117, 245). He remained at the Rest Center until October 1, 1944, when in accordance with its rules limiting stays to a maximum of six weeks, he was discharged (R. 118).[4] He testified that he still had the "same old ailments" (R. 118) and, upon returning home, he went to bed for several days (R. 119).[5]

[3] On July 31, 1944, petitioner went to the office of the attorneys for the underwriters of the vessel, where he was paid $247.10, and he signed a release in full (R. 115–116, 33–34). The courts below set aside the release (R. 45–46, 289, 321–326), and there is no question raised in regard thereto.

[4] There is no question here presented as to wages to the end of the voyage, or maintenance and cure until October 1, 1944, when petitioner was discharged from the Pacific Palisades Rest Center.

[5] The medical report of the Rest Center stated that petitioner complained of headaches and other nervous symptoms, including a fear that he might become a psychiatric patient (R. 249–250). That fear apparently was aggravated by visits of his father, who "in his anxiety was apt to be very critical and expressed the wish to collect greater damages" (R. 250). The Rest Center made a prognosis of "good" and recommended continued treatment at the U. S. Public Health Service at San Diego (R. 250).

On October 4 and 5, 1944, petitioner was furnished outpatient care by the U. S. Public Health Service in San Diego (R. 119, 251–252). The Public Health Service doctors advised hospital care and offered to send him to the Marine Hospital at San Francisco (R. 251, 119–120). Petitioner declined, saying that he would rather not (R. 120), "because, to my reasoning, after being in two hospitals and a rest center, if they couldn't find out what was the matter, why, I couldn't see going back to another hospital. It was just one doctor's opinion against a half dozen or more that I had seen already" (R. 121). He apparently told the Public Health Service officials in San Diego that he intended taking a trip to Sabinal, Texas, to visit the ranch of relatives, and was advised by these officials that "'when in Texas" there was a Public Health Service Office in Galveston which he could visit (R. 119, 122). While in Texas, he went to the United States Marine Hospital in Galveston to "get some medicine" (R. 121) and was advised by Public Health Service doctors to enter the hospital, which he refused to do (R. 254); he was then advised to enter the nearby Rest Center at Kittiwake, Texas, which he also refused to do (R. 254). He was given medication and told to return to Sabinal, and to live and work on the ranch (R. 254). He returned to San Diego in January 1945 (R. 122).

Since October 1, 1944, petitioner has not worked and has lived continually with his parents, except

for the time he was in Texas, when he lived with relatives. Petitioner's necessary living expenses have been paid by his parents (R. 216–217).

In the district court, Judge Cavanaugh stated: "There is pleaded in this complaint both general and specific negligence and the libelant is asking that the doctrine of *res ipsa loquitur* be applied. The court rules that the evidence shows both and that he can rely on that doctrine also" (R. 295).[6] The district court found as a fact that the petitioner was "struck upon the head by a large block, which was negligently and carelessly dropped by a fellow seaman * * *" (R. 43) and accordingly held that petitioner was entitled to recover damages for injury resulting from negligence (R. 296, 46). Specifically, petitioner was awarded $8,557.60 as loss of past and prospective wages for approximately two years and four months, at the rate of $3,600 per annum; and $7,500 for pain and suffering (R. 44, 291–294). Petitioner was denied a recovery of maintenance and cure after October 1, 1944, on the ground that petitioner had incurred no expense in connection therewith (R. 45, 290, 297).

On appeal, the court below reversed the district court judgment in favor of petitioner on the

[6] The district judge further stated (R. 295–296): "As I gather from this case, this libelant was on this boat, curling this rope around, and above him this block fell and hit him that was above him; that there was a man above there that was a fellow servant of the working man. That is negligence. * * *"

Jones Act cause of action (R. 317). Proof of the mere occurrence of the accident, the falling of the block, was held not to support a finding that Dudder was negligent or to warrant a judgment in favor of petitioner under the rule of *res ipsa loquitur*, applicable in this type of case (R. 317–320). The district court's denial of maintenance and cure to petitioner was affirmed (R. 328–329).

ARGUMENT

This case turns on its own facts and presents no novel question of general importance. Petitioner's right to recover damages for injury resulting from negligence exists solely by virtue of the Jones Act, *supra*, p. 2, which incorporates by reference the provisions of the Federal Employers' Liability Act, *supra*, p. 3, and petitioner's right to recover thereunder is no greater than that of railway employees. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 391–392. The court below recognized the source and scope of petitioner's right to recover for negligence and, in rejecting petitioner's contention that the doctrine of *res ipsa loquitur* here warranted judgment in his favor, followed the principles recently reiterated by this Court in *Jesionowski* v. *Boston & Maine R. Co.*, 329 U. S. 452.[7] Petitioner's claim for mainte-

[7] Cargo cases, such as *Commercial Corp.* v. *N. Y. Barge Corp.*, 314 U. S. 104, are applicable herein only to the extent that the rule of *res ipsa loquitur* which they state coincides with the rule stated under the Federal Employers Liability Act; to the extent that such cases contain a different rule, they are irrelevant here.

nance and cure was rejected in the courts below on a factual basis, and therefore presents no legal question requiring decision by this Court.

1. It is well settled that a recovery of damages for injury caused by negligence can be grounded on the doctrine of *res ipsa loquitur* where the proof shows that (1) the plaintiff was not negligent, (2) the defendant had exclusive control of all the factors which may have caused the accident, and (3) the accident was one which would not have occurred in the ordinary course of things if the defendant, having such control, used proper care.* *Jesionowski* v. *Boston & Maine R. Co., supra;* see also *Sweeney* v. *Erving,* 228 U. S. 233, 240; *San Juan Light Co.* v. *Requena,* 224 U. S. 89, 98–99. These elements all being present, the trier of fact is permitted to infer that the accident in question occurred as a result of the defendant's negligence. *Sweeney* v. *Erving,* 228 U. S. at 240. Here, however, the court below held that the necessary elements of a *res ipsa loquitur* case were not present, rejecting the claim that "* * * the circumstances were such as to justify a finding that [the accident] was a result of the defendant's negligence. * * *" *Jesionowski* v. *Boston & Maine R. Co.,* 329 U. S. at 457. We submit that

* There is no novelty in the application of the rule of *res ipsa loquitur* in Jones Act cases. *Johnson* v. *Griffith S. S. Co.,* 150 F. 2d 224 (C. C. A. 9); *Leathem Smith-Putnam Nav. Co.* v. *Osby,* 79 F. 2d 280 (C. C. A. 7); *Meton S. S. Co.* v. *Jensen,* 62 F. 2d 825 (C. C. A. 5); *Fauntleroy* v. *Argonaut S. S. Line, Inc.,* 27 F. 2d 50 (C. C. A. 4).

this holding was justifiable in the circumstances of this case.*

The mere occurrence of an accident, without more, does not justify the imposition of liability for negligence; nor does it enable a plaintiff to invoke the doctrine of *res ipsa loquitur* as a means of avoiding the presentation of evidence of such character as to warrant a shift to the defendant of the burden of going forward on the issue of negligence. *Atchison, T. & S. F. Ry Co.* v. *Toops*, 281 U. S. 351; *Delaware &c. R. R.* v. *Koske*, 279 U. S. 7, 11. The record here shows no more than the fact of the accident. Peti-

* Petitioner's point as to the propriety of a trial *de novo* by a Circuit Court of Appeals in an admiralty case (Pet. 12–13, 31–34) has no relevance where, as here, the court below reversed the district court as a matter of law. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 98–99. In any event, the opinion, findings of fact and conclusions of law of the district court were not rendered by the judge who heard the testimony but, after his death, by another district judge to whom the case was submitted on the transcript of record. In such circumstances, it is well settled that the plain and manifest error rule does not apply, that the findings of the district court are entitled to little weight and that the court below was clearly entitled to review the record independently. *The Ernest H. Meyer*, 84 F. 2d 496, 501 (C. C. A. 9), certiorari denied, 299 U. S. 600; *The Adriadne*, 13 Wall. 475, 479; *Matson Nav. Co.* v. *Pope & Talbot*, 140 F. 2d 295 (C. C. A. 9), certiorari denied, 326 U. S. 737; *Waterman S. S. Corp.* v. *United States S. B. & M. Co.*, 155 F. 2d 687 (C. C. A. 5), certiorari denied, 329 U. S. 761; *Stokes* v. *United States*, 144 F. 2d 82 (C. C. A. 2).

Petitioner's suggestion (Pet. 32) that the court below should have applied the two-court rule is manifestly without substance. There was only one district court decision.

tioner was engaged in a rounding in operation over which he exercised an equal if not a greater amount of control than Dudder, his fellow seaman. There is no showing (and, indeed, not even any factual evidence from which an inference either way could be drawn) that the block which fell from Dudder's hands had not been pulled as the result of an unduly violent haul on the line by petitioner. Petitioner was working on the free end of a block and tackle, the purpose of which was to multiply force, and since there were four lines of rope, any pull exerted by petitioner would multiply 3 or 4 times the pull exerted on the block held by Dudder. Nor is this possibility eliminated by petitioner's testimony that the last thing he remembered was that he was bending over coiling rope, for as pointed out by the court below, lapses of memory antedate the actual injury by short periods of time in many concussion cases (R. 319).[10]

[10] None of the materials relied on by petitioner (Pet. 21–22) negatives the possibility that the accident was caused by petitioner's own negligence. The pre-trial stipulation (R. 36) merely says that petitioner was hit by a falling block, and expressly states that the question of negligence is in issue (R. 39). The accident report of the purser (pharmacist's mate) was never offered in evidence and was received only for identification (R. 210); it probably would not have been admissible as evidence as to the accident, since it was a written report by a person who did not himself testify in regard to an event of which he had learned only at second-hand. Moreover, petitioner's theory that the accident occurred as the result of the casting off of a line which was fouled on a davit although allegedly based on the purser's report does

We submit that the court below was warranted in holding that the proof presented by the petitioner fell short of providing the necessary elements for invoking the doctrine of *res ipsa loquitur*. Nor can the missing elements be supplied by petitioner's contention, advanced for the first time in this Court, that he had not been furnished a safe place in which to do his work (Pet. 24–25).[11] This argument urges that, "* * * under the special circumstances shown * * *", Dudder's part of this rounding in operation was performed under "* * * extremely hazardous * * *" conditions (Pet. 24–25)[12] Obviously, however, this Court is not

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not accord with the statement in that report that it was the guy block itself which was caught on the davit (R. 263). In any case, there is nothing in the stipulation nor the testimony to substantiate either version of the accident, although if either had in fact occurred, petitioner would have seen and probably remembered at least that much of the accident since the davit was in front of him and he could see it from where he stood.

[11] This "safe place to work" argument sounds in the nature of a claim for recovery based on alleged unseaworthiness, an entirely separate type of claim from that available to seamen under the Jones Act, *supra*, p. 2. Considered as such, it should be noted that petitioner neither alleged nor proved such a claim in the district court nor urged it in argument before the court below.

[12] The photographs, on which petitioner relies in support of this contention, were not offered in the district court as evidence. Petitioner expressly stipulated that "* * * there is nothing in these pictures that are to be used for any purpose other than to explain the operation of the particular work that they [petitioner and Dudder] were doing and where this libelant was standing at the time he was injured * * *" (R. 64).

the forum in which to initiate speculation as to working conditions on a meccano deck, an arrangement frequently used in the stowage of deck cargo. Petitioner indulges in such speculation in the absence from the record of the specific testimony contained in Dudder's deposition. As admitted by petitioner, the testimony of Dudder, the only witness to the accident, was "* * * equally available to both parties * * *" (Pet. 34). Petitioner chose not to use the deposition on the ground "* * * that he was not satisfied with certain parts of it * * *", and that he had "* * * no burden * * * to bring in adverse witnesses * * *" (R. 316).[13] Whatever the basis of petitioner's decision not to offer the deposition, it can hardly be said that it warrants a presumption of exclusive Government control, negligently exercised and solely responsible for the accident, over petitioner's working conditions. The court below could properly regard as decisive the fact that control of the rounding in operation was principally in the hands of petitioner, and that his proof in no way negatived negligence on his part.

2. There is no occasion for a review of the rejection by both courts below of petitioner's claim

[13] The Government took Dudder's deposition but did not offer it since the burden of proving negligence was on petitioner. *Sweeney* v. *Erving*, 228 U. S. at pp. 238–239.

for maintenance and cure on and after October 1, 1944. It is well settled, as petitioner concedes, that a claim for maintenace and cure cannot be successfully made where, as a matter of fact, a seaman has rejected proffered hospitalization. *The Bouker No. 2,* 241 Fed. 831, 835 (C. C. A. 2), certiorari denied, 245 U. S. 647; *The Santa Barbara,* 263 Fed. 369, 371 (C. C. A. 2); *Cummins* v. *Wry,* 10 F. 2d 408 (C. C. A. 3); *Marshall* v. *International Mercantile Marine Co.,* 39 F. 2d 551 (C. C. A. 2); *Meyer* v. *United States,* 112 F. 2d 482 (C. C. A. 2); *Van Camp Sea Food Co.* v. *Nordyke,* 140 F. 2d 902 (C. C. A. 9); *Bailey* v. *City of New York,* 153 F. 2d 427 (C. C. A. 2); *Stewart* v. *United States,* 25 F. 2d 869 (E. D. La.); cf. *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 531. And there is ample justification in the record for the finding by the court below that petitioner had refused hospitalization. When petitioner left the Pacific Palisades Rest Center, after having stayed the maximum time permitted by its rules, he was directed to report to Public Health Service doctors in San Diego (R. 118, 122, 249–250). When he so reported, he was told to enter the Marine Hospital at San Francisco (R. 251, 119–121), but he refused to do so, preferring not to follow the advice of the Public Health Service doctors and apparently announcing his intention

to visit in Texas (R. 121, 122). It is obviously improper to infer from the lack of power on the part of Public Health Service officials to compel petitioner to enter a hospital that they had "acquiesced" in petitioner's plan to go to visit in Texas as an alternative course of treatment. Such "acquiescence" clearly did not indicate that the Public Health Service officials considered hospitalization unnecessary, but rather was merely a recognition of petitioner's refusal to be hospitalized.[14] Petitioner's continuing rejection of hospitalization is shown by his refusal to enter the Marine Hospital at Galveston or the Rest Center at Kittiwake, Texas, in accordance with advice received from Public Health Service officials in

[14] Both *Moyle* v. *National Petroleum Transport Corp.*, 150 F. 2d 840 (C. C. A. 2) and *Rey* v. *Colonial Navigation Co.*, 116 F. 2d 580 (C. C. A. 2) relied on by petitioner (Pet. 27) are distinguishable on their facts. In the *Moyle* case, the seaman had been discharged from the hospital and "no further hospitalization needed" noted on his hospital record. Further the court found that there was nothing in the record to indicate that additional hospital treatment at that time would have been of any benefit. In the *Rey* case, although there was some evidence that the seaman had requested his release from the hospital in order to spend the summer on a farm, and a doctor testified that additional hospitalization would have been desirable, the hospital record showed "maximum improvement from hospitalization" as the reason for discharge, and the hospital doctor advised the seaman to return in the fall for a checkup. Since the court found the seaman suffered from tuberculosis, which is primarily a matter of rest, it held that the question of whether the seaman had forfeited his rights was one for the jury, and reversed the district court's dismissal of the complaint for failure of proof.

Galveston to whom he went for medication (R. 253–254). The court below was clearly justified in finding, from these facts, that petitioner had rejected hospitalization which, in and of itself, defeats his claim for maintenance and cure.

Moreover, petitioner's claim for maintenance and cure was rejected by both courts below on the ground that he had incurred no expense in connection therewith. There is ample authority to support this disposition of his claim. *Field* v. *Waterman S. S. Corp.*, 104 F. 2d 849 (C. C. A. 5); *Carroll* v. *Moran T. & T. Co.*, 88 F. 2d 144 (C. C. A. 9); *Cummins* v. *Wry*, 10 F. 2d 408 (C. C. A. 3); *Robinson* v. *Swayne & Hoyt*, 33 F. Supp. 93 (S. D. Cal.); cf. *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 531; *Bailey* v. *City of New York*, 153 F. 2d 427 (C. C. A. 2) and cases there cited.

CONCLUSION

The decision below raises no issue of general importance, and there is no conflict of decision. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
PEYTON FORD,
Assistant Attorney General.
SAMUEL D. SLADE,
MELVIN RICHTER,
Attorneys.

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